Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1997

MARTIN BELLOWS, Individually and on Behalf of Phillips Industrial Constructors, Inc.,

Petitioner,

v.

AMOCO OIL COMPANY; ET AL,

AMOCO OIL COMPANY, TEXAS CITY REFINERY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a contract an intrinsic part of the employment relationship whether written, oral, formal or informal?

2. Is an employee's complete loss of wages a sufficient change in the employment relationship to constitute interference with the making, enforcement, performance, modification, termination and enjoyment of the benefits, privileges, terms and conditions of the contractual relationship in violation of 42 U.S.C. § 1981?

3. Is third party interference with the making, enforcement, performance, modification, termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship a violation of 42 U.S.C. § 1981?

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on July 16, 1997.

OPINIONS BELOW

The opinion of the district court was not published. (App. 28a-34a). The opinion of the court of appeals was published at 118 F.3d 268 (5th Cir. 1997) (App. 1a-22a).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on July 16, 1997. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 (as amended by the Civil Rights Act of 1991)

Equal rights under the law

a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. § 1977; Pub.L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071)

STATEMENT OF THE CASE

This case is about the fundamental right to contract as ensured by the former slave statutes passed after the abolishment of slavery in this country by virtue of the United States Constitution, Amendment 13. On September 7, 1994, Martin Bellow, individually and as President of a Texas corporation known as Phillips Industrial Constructors, Inc. (herein referred to as PICI), brought a lawsuit, in the United States District Court for the Southern District of Texas - Galveston Division, asserting that his and the corporation's civil rights had been violated by the conduct of the defendant Amoco and its agents and assigns. Bellow asserted that he, as an individual, and PICI, as a minority business, were discriminated against by AMOCO due to Bellow's race. Plaintiffs' lawsuit was brought under

42 U.S.C. § 1981 and after extensive discovery by the parties, the case was called to trial, before a jury, and was tried from September 18, 1995 to September 25, 1995. The lawfully impaneled and selected jury in its verdict found adversely to the interest of Phillips Industrial Constructors, Inc. (finding that Amoco did not discriminate against PICI on the basis of race in terminating, modifying, changing, or refusing to contract with PICI), but found in favor of Martin Bellow individually (finding that Amoco did discriminate against Martin Bellow because of his race in terminating, modifying, or changing Martin Bellow's right to contract with PICI). (App. 23a - 25a).

The facts presented at trial revealed that Amoco's conduct put PICI and Bellow out of business. The jury found that the conduct of Amoco was malicious, egregious, willful and in reckless or gross disregard to the rights of Martin Bellow. The district court affirmed the jury verdict and denied Amoco's motion for judgment as a matter of law. (App. 26a - 27a). Amoco proffered an appeal to the Fifth Circuit asserting as follows: Bellow failed to prove Amoco interfered with his right to make and enforce a contract with PICI; there could be no cognizable claim under section 1981 premised on Amoco's interference with an implied contract between Bellow and PICI; and compensatory and punitive damages awarded were not supported by the record evidence. The appellate court reversed the judgment reached by the jury, confirmed by the district court, and rendered for AMOCO. (App. 21a - 22a). In its opinion, the appellate court stated that it assumed for purposes of the appeal that Bellow had an implied contract with PICI as an employee1(App. 15a) but determined that there was no

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1 The appellate court stated that it was assuming for purposes the appeal that "Bellow had some undefined character of implied contract with PICI" stating that the record was devoid of

proof that Amoco interfered with said contract. (App. 17a). The appellate court specifically stated that they did not rule on the following issues, to-wit: 1) whether third party interference with a contract could be considered a violation of 42 U.S.C. § 1981 (App. 15a); 2) whether there was sufficient evidence to support the jury's award of damages. (App. 21a(fn28)).

Martin Bellow is an African-American male. He entered into an agreement with Harold Phillips, the sole owner of Phillips Industrial Constructor's Services, Inc. upon the suggestion of an Amoco contracts administrator named Billy Revak. In 1979, Amoco was fostering the development of minority contractors. Billy Revak encouraged Harold Phillips, the 100% shareholder of PICI, to take the steps necessary to be qualified as a minority business. Harold Phillips needed a minority person to own 51% of the stock of his company, someone he could trust. He and Martin Bellow entered into an agreement; Bellow went without a salary for a period of time in lieu of cash purchase of PICI stock. Bellow was designated President and owned 51% of PICI stock. Phillips worked the administrative side of the business; Bellow worked in the field as the field superintendent. As soon as the company was able, Bellow and Phillips both took a salary and were compensated for overtime worked. This was their livelihood, their jobs. In addition, as business owners, they received bonuses if and when the company was able to provide such.

From 1979 through 1994, PICI's contract work was predominately situated at the Amoco Refinery - Texas City. PICI's work at Amoco grew steadily until 1988 when there

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evidence of any express contract between Bellow and PICI. (App. 15a). Bellow contends that the record was not devoid of such evidence as will be elaborated upon infra.

was somewhat of a decrease which leveled out until 1991 - 1994 when PICI experienced a drastic decrease in contract work until ultimately PICI received no further contract work at the Amoco plant.2

Phillip's trial testimony depicts how, even as early as 1989, Jordan was concerned about how much money Bellow was making. Jordan told Phillips, that Bellow was making too much money. Phillips testified as follows:

"Q. You said in 1989 Jerry Jordan and - - am I assuming he had a conversation with you?

A. Yes, sir, on the job in Amoco on the weekend.

Q. Do you remember what month in 1989 it was?

A. I don't remember the exact month. It was out in the hot part of the summer.

Q. Do you recall the circumstances - -

THE COURT: That's between February and November.

THE WITNESS: No, sir, like July.

BY MR. GRIFFIN:

Q. Do you remember the circumstances, where you were standing at the time?

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2 Bellow and the economist, Dr. Wolf, testified that the refinery business in the area was small in the sense that once you were "blacklisted" you could not get contracts with other companies.

A. Yeah. I was on the job looking down in this hole, which was a deep hole about 20-foot deep, full of hydrocarbons and whatnot. Jerry came up, and we walked over and sat on the loading docks of a building. And we talked about the job, and then he got talking about how much money Martin was going to make out there that day.

Q. And what did he say?

A. I didn't pay any attention to him to start with, and then he finally just said, 'Martin makes too much money. He's going to make over $2,000 a day,' which is not true.

Q. Now, isn't that an insignificant comment, that Martin is making too much money?

A. It was insignificant at the time it was said, yes."

Phillips went on to testify that the significance of the conversation with Jordan in 1989 became apparent in light of Jordan's subsequent actions and words.

Bellow presented evidence showing that it was during the 1991 - 1994 time frame that supervisors at Amoco, Doug Blyth and Jerry Jordan, enacted a racial attack. Evidence was presented that Jerry Jordan believed Bellow was making too much money, he wanted his "fat nigger ass out" of the plant, instructing employees to get PICI and Bellow out of the plant.

Amoco's Contracts Administrator, Emmanuel Moore, began to field complaints from the Job Representatives that worked under the supervision of Jerry Jordan that Bellow's race was having a negative impact on PICI contracts or potential contracts with Amoco. The Job Representatives

providing the information were Melvin Hagler, a Black male; Howard Luster, a White male; Rick Davis, a White male; and Clarence Holloway, a Black male. Emmanuel Moore testified that he did not report the alleged discriminatory conduct with the plant manager or any higher authority. The discriminatory attack continued uncensored.

Bellow explained that initially he did not have problems in the Amoco facility. Bellow's problems began when it was discovered that his role in PICI was greater than a "hired hand." Bellow began to get comments of Jerry Jordan not liking him and thus preventing Job Representatives from assigning his company jobs in the facility (1993, 1994), that he should watch his self, that Jordan was making racial comments about him (1994) (testified to by John McLemore), and that Melvin Hagler related having overheard Jordan and Howard Luster speak of running "his nigger ass off."

The following portion of Bellow's testimony further exemplifies the attack and its impact.

"[Mr. Griffin]

Q. Rudolph Goffney, when he testified, said that oftentimes folks at Amoco would not - - some of the job reps would not deal with you.

[Mr. Bellow]

A. Yes, sir.

Q. What does that mean?

A. If something was to happen - - Rudolph worked directly for me. And we had a contract called a maintenance agreement with the labor refinery crew, and we furnished the laborers to Amoco. If something was wrong on Rudolph's job, rather than talk to me, the person they would find was Ricky Childs and talk to him about it. I passed right next to a guy looking for Ricky Childs, to report something that had happened on one of our jobs.3

Q. What did you think about that?

A. Well, I don't know. It's kind of hard nowadays in time to be able to take that kind of stuff.

Q. Why?

A. It just is. Times are supposed to be changed by now.

Q. What did you think about that?

A. Well, I don't know. It's kind of hard nowadays in time to be able to take that kind of stuff.

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3 Both Rudolph Goffney, a PICI labor foreman and Harold Phillips("bird-dogged him"); (wouldn't deal with him even though he had ultimate authority); (talked on one or more occasions about pulling Martin out of the field, "would be doing same Amoco would be doing") testified hatred directed at Bellow extended to ignoring his authority on the job site and seeking out White superintendents for the company instead. Both Bellow and Phillips conveyed that they considered pulling Bellow out of the field (his specialty and interest) and hiring a White superintendent instead; they elected not to take this path - their business closed instead, they became nominally unemployed in the process.

Q. Why?

In the early nineties, Bellow attempted to talk to Jerry Jordan about statements made by an Amoco employee supervised by Jordan, Sherman McKnown, addressing Bellow as a "fat nigger" who was forcing the company to work him. Bellow's concern was the obvious hostility towards his race and Amoco's agents hostility directed to affirmative action benefits received by PICI. Jordan's response was to inform Bellow he (Jordan) was also prejudiced against Black people. The comments in and of themselves were injurious, but the attack was more than mere words as seen in the demise of PICI's business at the Amoco Refinery and thereby Bellow's loss of income from PICI.

At the time the comments were made in 1989 both Phillips and Martin Bellow ignored them. Bellow commented that "[b]ut I didn't pay too much attention to it then, because I figured - - I just didn't know - - you know, I didn't pay no attention to it. I went on about my business and I kept on trying to achieve my goal of finishing my job."

Amoco presented evidence in an effort to persuade the jury that PICI was eliminated due to Amoco's plan to phase out the use of small contractors. Bellow pointed out that their competitor, a small contractor, Trey Industries, received more work during the time in question. In fact, Bellow testified that as PICI's business died, they had to sell their equipment. Trey Industries purchased some of PICI's equipment.

It became impossible for Bellow to go about his job. Bellow had worked at the Amoco Refinery for 25 years. The loss of contract work at Amoco would not have been a

violation of Bellow's right to contract with PICI but for, the fact that it was due to racial animosity. In fact, when asked on cross-examination whether he thought Amoco owed him something or had an obligation to him, Bellow, a humble man from Louisiana, replied, "No, sir, they didn't have no obligation to give us no work; but when we got work, we got stomped on, kicked us in the butt, and they stomped our head to the ground. There was no reason for that all."

REASONS FOR GRANTING THE WRIT

This Court should grant the requested writ in this matter for the following reasons, to-wit: one, to correct the appellate court's indication that Bellow does not have an employment contract; two, to correct the appellate court's erroneous application of 42 U.S.C. § 1981 statute prior to the amendment known as the Civil Rights Act of 1991 in determining whether Amoco could or did interfere with Bellow's contract as an employee of PICI; and three, to rectify the appellate court's failure to rule on the issue of whether a third party (Amoco) can interference with a contract (Bellow/PICI employment contract) in violation of 42 U.S.C § 1981. These are important issues which are in contradiction to this Court's interpretation (issues 1 and 2) and a novel issue not previously addressed by this Court (issue 3).

[42 U.S.C.] § 1981 has far-reaching economic consequences... such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference. *Goodman v. Lukens Steel Co.* 107 S. Ct. 2617, 2621 (1987).

42 U.S.C. § 1981 serves its purpose when a jury is able to weigh the evidence and give a clear and true message

to a large corporation such as AMOCO declaring it is illegal to destroy a person's employment (contractual) relationship, their livelihood, as a result of intentional racial discrimination. The issues presented to this Court for consideration are of the utmost importance in two respects. First, it is important for this Court to determine the scope of the 42 U.S.C. § 1981 as amended Civil Rights Act of 1991. As stated by the Fifth Circuit Appellate Court, it has not been clearly established at the appellate level whether third party interference with a contractual relationship is a violation of 42 U.S.C. § 1981. (App. 13a). Second, for public policy reasons it is crucial that this Court confirm that racial attacks intended to destroy or in the language of the statute, interfere with a citizen's right to contract and to enjoy the benefits thereof, are most certainly a violation of 42 U.S.C. § 1981. Racial hostility in the work place is often very hard to identify because it is indirect. This Court has indicated that in Title VII cases, circumstantial evidence of racial animus and motive is frequently all the evidence available. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). It is rare that a taped conversation of the racial hostility at the management level is leaked out to the public as occurred with Texaco in 1996. Yet, Peter I. Bijur, Chairman of Texaco Inc., stated the "Texaco is struggling to cope with the same racial attitudes that exist at virtually all companies." Sharon Walsh, *Chairman says Texaco is Battling Racial Bias*, Wash. Post, July 30, 1997, at D9. In this case, the racial hostility and concomitant attack is verbalized. *Bellow* was not an employee of Amoco. He was a contractor. Amoco's (racial) Non-Harassment Policy did not apply to contractors. Employees and/or owners of minority businesses are likely to become the target of unabated race based attacks such as the one the jury determined occurred in this instance. The right to contract the same as white citizens is not a new right, it is

not a request for special consideration. It is simply prayed that this Court affirm 42 U.S.C. § 1981's intended purpose, to ensure that no person's right to pursue a livelihood is trampled as a result of racial animosity.

"To establish a claim under 42 U.S.C. § 1981, a plaintiff must allege facts in support of the following elements: 1) plaintiff is a member of a racial minority; 2) an intent to discriminate on the basis of race by the defendant; 3) the discrimination concerns one or more of the activities enumerated in the statute. *See, Mian v. Donaldson, Lufkin & Jenrett Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993)" *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994).

In this case, the applicable statute, 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, was specifically crafted to provide comprehensive protection from discrimination affecting persons' contract rights, to-wit:

a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens...

B) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

C) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (a)-(c).

The Civil Rights Act of 1991 became effective on November 21, 1991. Only causes of action arising after November 21, 1991 are determined under the Civil Rights Act of 1991. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). In its jury instructions, the district court specifically restricted Bellow's cause of action to acts of discrimination which occurred on or after September 7, 1992. (App. 32a).

1. A Contract is an intrinsic part of the employment relationship whether written, oral, formal, or informal.

Bellow was a 51% shareholder and an employee of PICI. He held the title President. He was paid a salary and overtime pay as an employee. As a shareholder, he and his partner, Phillips received bonuses when the company was able to provide such. The appellate court stated that "although we assume, for purposes of appeal, that Bellow had some undefined character of implied contract with PICI, we note that the record is conspicuously devoid of any evidence of any express contract between Bellow and PICI." It is important to clarify and establish Bellow's contractual relationship due to the reluctant nature of the appellate court's assumption of an employment contract.

This Court's holding in *Hinshon v. King & Spalding*, that "in the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace" is quite applicable in the case at bar. *Hinshon v. King & Spalding*, 467 U.S. 69, 74 104 S.Ct. 2229, 81 L.Ed.2d

59 (1984). Title VII and 42 U.S.C. § 1981 have similarities of purpose and overlapping applicability although "1981 (and hence 101) is not limited to employment; because it covers all contracts...." *Rivers v. Roadway Express, Inc.* 511 U.S. 298, 312-13, 303 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Furthermore, there was testimony of PICI "handing Bellow a shovel and a place to work" both metaphorically and literally, as there was testimony stating that Bellow was a field superintendent. In addition, Bellow's work involved physical labor and supervision in some of the most dangerous and dirty jobs in the plant.

The appellate court indicated that no authority was cited, nor was the court aware of case law which stated that being majority shareholder and president of a corporation, without more, gives rise to a contractual relationship. Bellow contends that, in fact, the testimony that Bellow worked for PICI as a supervisor in the field and held the title of president, he received a salary from PICI and he received overtime pay from PICI is sufficient evidence of an employment contract with PICI. Further, the fact that Bellow was provided a shovel and a place to work is all that is necessary to evince an employment contract. Being a shareholder does not contraindicate Bellow's role as an employee. In *Rosales v. AT&T Information Systems, Inc.*, the court stated, "[t]his court is unaware of any authority suggesting that a person who lawfully invokes the incorporation laws thereby forfeits his rights under 1981." *Rosales*, 702 F. Supp. 1489, 1497 (D.Colo. 1988).

The appellate court's assumption of an employment contract for purposes of the appeal is supported by sufficient evidence of an employment relationship which is inherently contractual.

2. An employee's complete loss of wages is a sufficient change in the employment relationship to constitute interference with the making, enforcement, performance, modification, termination and enjoyment of the benefits, privileges, terms and conditions of the contractual relationship in violation of 42 U.S.C. § 1981.

The evidence presented to the jury showed that Martin Bellow went from earning $55,982.50 in 1993 to earning no salary at the time of his testimony in 1995 as a result of the discriminatory acts of Amoco. Bellow's right to enjoy the benefits of his contractual relationship with PICI was radically altered. He no longer had a place to work, he no longer received a salary. The atrocity from a legal perspective is not the fact that PICI lost work and therefore could not pay its employees, it was the fact that the reason for the interference with Bellow's right to contract was caused by racial animus.

The appellate court determined that Bellow had no claim under section 1981, because there was no substantial change in his contractual relationship and that Amoco could not, even if they wanted to, interfere with Bellow's relationship with PICI. (App. at 18a). The primary case cited by the appellate court in support of this position was *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1170-71 (5th Cir. 1996), which stands for the proposition that "[i]n deciding whether a change of position rises to the level of a new and distinct relation [under section 1981], the court must compare the employee's current duties salary, and benefits with those incident to the new position." (App. 17a).

The appellate court's position is derived from this

Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 185, 109 S.Ct. 2363, 2377, 105 L.Ed.2d 132 (1989). The Fifth Circuit has erred in applying the *Patterson* decision to the extent that the *Patterson* criteria would only apply to cases or facts which occur prior to the enactment of the Civil Rights Act of 1991.

In *Patterson*, this Court specifically based the evaluation of whether a person's contractual rights had been violated upon the interpretation of 42 U.S.C. § 1981 prior to the enactment of the Civil Rights Act of 1991, to-wit: "[ ] conduct, reprehensible though it be if true, is not actionable under 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 179.

This Court enunciated that *Patterson* provides authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991. *Rivers v. Roadway Express, Inc.* 511 U.S. 298, 312-13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Causes of action arising after November 21, 1991 must comply with the Civil Rights Act of 1991's intent to "provide [expanded] protection for employees in the 'making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.' 42 U.S.C. § 1981(b) (Supp. IV 1992)" *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 878, (9th Cir. 1996).

In *Strother*, the Ninth Circuit appellate court properly decided whether the contractual relationship was altered sufficiently based on the *Patterson* criteria for all acts

which occurred prior to November 12, 19914. All acts occurring after November 12, 1991, were remanded to district court for reconsideration based on the provisions of the Civil Rights Act of 1991. *Id.* The Fifth Circuit appellate court erred in applying the *Patterson* standard to this case involving discriminatory acts and contract interference occurring after November 21, 1991.

The appellate court also refers generally to *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996), in support of their determination that there was insufficient interference with Bellow's contract with PICI to be a violation of 1981. (App. 17a). This case is distinguishable from the *Bellow* case and is not applicable in resolving this issue. In *Office Max*, the appellate court denied relief under 1981 because Morris, a customer at Office Max, asserting that he intended to purchase a time stamp, never expressed more than a general interest in merchandise...they never sought to enter into a contractual relationship with Office Max. The issue in *Office Max* was whether a prospective contract or an intent to contract existed. In contrast, Bellow had an employment contract with PICI over a period of many years. The appellate court's assumption that there was an employment contract in and of itself obviates the Office Max's applicability. The question to be evaluated in the case at bar is whether complete loss of wages constitutes an interference in Bellow's contract rights as defined by the Civil Rights Act of 1991.

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4 The date of the Civil Rights Act of 1991 as enunciated by this Court in *Rivers v. Roadway Express* was actually November 21, 1991. *See, Rivers*, 511 U.S. at 312-13. In *Strother*, the court's use of November 12, 1991 date appears to be an inadvertent mistake in that specific reference is made to the need for the district court to apply the expanded provisions of the Civil Rights Act of 1991. *Strother*, 79 F.3d at 877.

3. Third party interference with the making, enforcement, performance, modification, termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship is a violation of 42 U.S.C. § 1981.

Third party interference with a contract in violation of 42 U.S.C. § 1981 is what occurred in the case at bar. There is no clear standard established by the courts below to provide guidance in making determinations in section 1981 third party interference cases. This Court's guidance is required to provide proper interpretation of section 1981 cases, which is critcal in order to ensure the protection of citizens' rights to contract without interference due to racial animus.

As indicated previously, the appellate court, in the case at bar, abstained from reaching a decision on the issue of whether third party interference claims are actionable under section 1981. Nonetheless, the court indicated that Bellow's contention that the Fifth Circuit, in *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir. 1975), *cert. denied*, 422 U.S. 1006, 45 L. Ed. 2d 669, 95 S. Ct. 2627 (1975), stood for the proposition that third party interference claims are actionable under section 1981, was too broad of an interpretation. (App. 13a - 14a). Petitioner contends that a broad reading of *Farraca* to include third party interference as a violation of section 1981 is proper based upon the statute and holdings of various courts as discussed infra.

The district court in the Eastern District of Michigan provided a cogent analysis of various courts' treatment of this issue in 1987, to-wit:

The former Fifth Circuit has long held that privity of

contract is not necessary for a violation of § 1981 regarding the right to make and enforce contracts. *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir.), cert. denied, 422 U.S. 1006, 45 L. Ed. 2d 669, 95 S. Ct. 2627 (1975) (third party's interference with prospective contract rights prohibited by § 1981).... In *Faraca*, the court relied on the Supreme Court's ruling in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) that the right to lease under 42 U.S.C. § 1982 is protected against actions of third parties who interfere with that right, and applied the reasoning to 1981 as well. The conclusion in *Faraca* is sound given that both 1981 and 1982 were derived from the Civil Rights Act of 1866, and that the language of the two sections is almost identical. [citing] *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976), the Supreme Court employed similar reasoning in holding that § 1981 like § 1982 applies to purely private acts of discrimination. The Runyon court noted that the operative language of both sections is traceable to the 1866 Act, which was designed "'to prohibit all racial discrimination, whether or not under color of law, with respect to rights enumerated therein'" and concluded that "'in light of the historical inter-relationship between § 1981 and § 1982 [there is] no reason to construe these sections differently.'" Id. at 170-71, 96 S.Ct. at 2594-95...

Recently, the Third Circuit joined the Faraca court in holding that § 1981 prohibits racially discriminatory interference by third persons with the right to make and enforce contracts. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3rd Cir. 1986), aff'd on other grounds, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d

582 (1987).

In Saint Francis, the court opined:

> If the individuals are personally involved in the discrimination against the Appellant, and if they intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable.

784 F.2d at 518 (emphasis added) (citing *Sullivan*). Thus there is strong support for the view that privity of contract is not a prerequisite to liability under § 1981.

Nieto v. United Auto Workers Local 598, 672 F.Supp. 987, 989-90 (E.D.Mich. 1987).

The *Nieto* court held that a supervisor can state a cause of action under section 1981 against subordinate employees and their labor union, with whom she has no privity of contract. *Nieto*, 672 F.Supp. at 990.

In Illinois, the district court held that if the third party were related or in some way connected to the contracting parties, such interaction would be a consideration in determining whether the third party could be found liable for violation of 1981. *Morrison v. American Bd. of Psy.*, 908 F.Supp. 582, 589 (N.D. Ill. 1996) (if the licensing board's actions significantly interfere with Plaintiff's ability to contract with future employers, the Defendants argument of unrelated third party interference with contract is not applicable.)

The Seventh Circuit, in *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 914 (7th Cir. 1991), a case involving a union's job referral service, stated that to interpret § 1981 as not covering a party that discriminatorily obstructs another's right to contract would:

> **shorten the reach of the statute and prevent{} the Reconstruction-era civil rights remedy from being used to impose liability on intermediaries who erect insurmountable barriers to the formation of contracts.**

***See also*, *Lewis-Kerns v. Mayflower Transit, Inc.*,932 F.Supp. 1061, 1070 (N.D. Ill. 1996) ("Section 1981 proscribes not only discrimination by the contracting party...but also discriminatory interference by a third party with the exercise of the right to make contracts" *citing*, *Vakharia v. Swedish Covenant Hospital*, 765 F.Supp. 461, 471 (N.D. Ill. 1991); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992), holding that "[a]n important purpose of section 1981 is to eliminate race based interference with the right of each citizen to contract. In accordance with this principle, courts have not imposed a privity of contract type requirement that would otherwise protect third parties from section 1981 liability. *See, e.g., London v. Coopers & Lybrand*, 644 F.2d 811, 817-18 (9th Cir. 1981); *Woods v. Graphic Communications*, 925 F.2d 1195, 1202-03 (9th Cir. 1991); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 913-916 (7th Cir. 1991), cert. denied, ___U.S.___, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992)."**

Bellow's contract with PICI as an employee and wage earner was purposefully attacked. There was testimony to the effect that Jordan did not want Bellow, the "nigger," to make so much money. Jordan's stated goal was

accomplished. Bellow was out of the plant, and he was not making any money. When the jury rendered their verdict in favor of Bellow for subjective and punitive damages, Amoco was held accountable for its race-based behavior. 42 U.S.C. § 1981 and the Civil Rights Act of 1991 were enacted to protect citizens from exactly this kind of malicious interference with one's livelihood. Amoco, a third party, was in the position to have a devastating impact upon Bellow's employment. The fact that Bellow did not directly contract with Amoco did not ameliorate the power Amoco had over Bellow's relationship with PICI as an employee. That power was wielded to attack. Such a racial attack by a third party should be considered a violation of 42 U.S.C. § 1981 and the Civil Rights Act of 1991.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-40051

MARTIN BELLOWS, Individually and on Behalf of Phillips Industrial Constructors, Inc.,

Plaintiff-Appellee,

versus

AMOCO OIL COMPANY; ET AL,
Defendants,

AMOCO OIL COMPANY, TEXAS

CITY REFINERY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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July 16, 1997

Before GARWOOD, WIENER and DEMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs Martin J. Bellow[1] (Bellow) and Phillips Industrial Constructors, Inc. (PICI), a Texas corporation, brought this lawsuit against defendant Amoco Oil Company, Texas City refinery (Amoco), alleging that Amoco discriminated against them on the basis of their race by terminating, modifying, or changing their right to contract in violation of 42 U.S.C. § 1981. A jury returned a verdict in favor of Bellow, awarding him $50,000 in "subjective damages" and $225,000 in punitive damages. We reverse.

Facts and Proceedings Below

Bellow, an African-American, began working in the construction business in 1970, working primarily in Texas City, Texas, and the surrounding Gulf Coast area specializing in civil construction and equipment operations. In 1974, Bellow met Harold Phillips (Phillips), a Caucasian, while they both worked for the same construction company. They instantly became friends, and over the next several years Bellow and Phillips continued to work together, first at the M.W. Kellogg Company, then at Byrd Construction, and later at Callie Construction.

In the summer of 1978, Phillips left Callie Construction and, with his wife, formed his own construction firm, PICI, a corporation organized under Texas law. During the first six months of its operation, PICI had difficulty obtaining construction work.[2] In early 1979, Phillips learned that

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[1] Bellow's name was misspelled ("Bellows") in the original pleadings and, consequently, in the caption of the case as well. This caption misspelling was never corrected below.

Amoco was seeking qualified minority-owned construction firms to perform maintenance and construction work at its Texas City refinery. To take advantage of this opportunity, Phillips approached Bellow in March 1979 and offered him a 51% ownership interest in PICI. Bellow accepted the offer and became the president of PICI, while Phillips became PICI's vice-president and general manager, owning 49% of the corporation's stock.[3] On March 3, 1979, Bellow and Phillips wrote a letter to Amoco informing it of PICI's new status as a minority-owned construction firm. Soon thereafter, PICI began receiving general maintenance and construction work from Amoco.

Beginning in 1979, and lasting throughout the 1980s, PICI's business relationship with Amoco flourished. During this time, almost all of PICI's business involved work from Amoco's refinery. PICI performed a variety of civil construction and related maintenance work for Amoco, producing several millions of dollars in annual gross revenues for PICI (the amended complaint alleges that PICI's gross receipts from the Amoco refinery totaled over 32 million dollars from January 1985 through June 1994). Bellow worked primarily in the field as a superintendent overseeing the work of PICI crews at the refinery, while Phillips was responsible mainly for the day-to-day administrative duties at the office.

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[2] During those six months, PICI managed to secure only two small construction jobs valued at less than $20,000.

[3] Bellow acquired 5,100 shares of the stock and Phillips retained 4,900 shares. Because Phillips had already invested $9,000 in the corporation, Bellow agreed to work for six months without pay in exchange for the 5,100 shares of stock.

PICI's decade of prosperity came to an end, however. Sometime during the mid-1980s, Amoco began reevaluating its use of contractors and suppliers at the Texas City refinery. At one point, over 3,000 contractors and suppliers performed work for the refinery. In an effort to improve its monitoring of contractors and increase its efficiency, Amoco decided to reduce the number of contractors through "contract consolidation." Under this consolidation process, Amoco decided to use a single, primary contractor to perform most of the construction and related maintenance work that its own personnel could not handle.[4] In 1989, Amoco began informing its construction contractors, including PICI, that it would begin using Brown & Root Industrial Services (BRIS) as its primary outside maintenance contractor.[5] Under its new contract consolidation policy, construction jobs would first be assigned to Amoco personnel. If Amoco personnel were unavailable, the job would be assigned to BRIS. If BRIS did not have the personnel available or lacked the expertise for a particular job, Amoco's Contracts group would either bid the job to outside contractors[6] or hire a contractor under a cost-plus contract.[7]

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[4] According to Richard Evans, vice-president of refining and engineering at Amoco, Amoco's competitors at the time had already moved in the direction of using a single contractor.

[5] It was undisputed that none of the individual defendants in this case had a hand in Amoco's contract consolidation decision or the decision to hire BRIS as the new primary contractor. Also, Bellow conceded at trial that Amoco's decision to utilize BRIS as the primary outside general maintenance contractor was not motivated by racial animus.

[6] At Amoco, two groups worked directly with outside

Beginning in 1990, PICI and other general maintenance contractors experienced a dramatic decline in their general maintenance work.[8] Because Amoco personnel and BRIS

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contractors such as PICI. The Contracts Administration group (Contracts group) in the purchasing department was responsible for awarding contracts to outside contractors, including the selection of contractors, providing the terms of the contract, and authorizing payment to contractors. The other group was the Plant Support and Contracting group (PS&C group) in the maintenance department. The PS&C group was responsible for monitoring all construction and maintenance contractors while they performed their work, and for scheduling and initiating to the Contracts group all requests for construction and maintenance services.

[7] There were three methods by which Amoco retained services of a construction and maintenance contractor like PICI. The first method was by a "cost-plus" contract. Cost-plus contracts were generally awarded for a particular, specific job or assignment without bidding. The second method was by competitive bidding. However, to avoid overlap of charges for services rendered on cost-plus jobs, companies currently performing cost-plus contract work were not allowed to bid on jobs. Because PICI preferred to do cost-plus work, they seldom performed bid work. The third method for retaining a contractor was with a year-to-year labor contract. PICI had several service agreements with Amoco, including a general maintenance contract, a refinery labor crew contract, a contaminated soil agreement, and an outside lot mowing contract.

[8] See note 7, supra. The PICI service agreements that were canceled included a general maintenance contract, a refinery labor agreement, a contaminated soil agreement, and an outside lot mowing contract. Bellow conceded at trial that Amoco's decisions not to renew PICI's contracts in 1991 were made for reasons unrelated to Bellow's race. According to Bellow, "my complaint is

consumed the bulk of Amoco's maintenance jobs, little work was left over for PICI and other maintenance contractors. In 1991, PICI's work load decreased even further when Amoco decided not to renew PICI's service agreements----the primary source of PICI's work.[9] From 1991 to 1994, PICI performed whatever cost-plus work it could obtain. PICI was invited to bid on several jobs when it did not have any cost-plus contract work in the refinery; however, PICI was rarely a successful bidder, as its bids were usually too high. PICI's annual gross revenues from Amoco work dropped from approximately $3.5 million in 1990 to $209,537 in 1994 and $0 for the first half of 1995.[10]

At around the same time that Amoco implemented its new contract consolidation policy, Bellow started to notice that Amoco was treating him in a manner which he believed to be discriminatory. Specifically, Bellow believed that Jerry Jordan (Jordan), an Amoco employee who worked as a supervisor both with the Contracts group and the PS&C group, was on a mission to "run him out of the refinery" solely because Bellow was African-American.[11] The specific

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not that they canceled our contract. My complaint is the way they treated us when we did work in [the refinery]."

[9] Of these contractors, only PICI was a minority-owned firm.

[10] PICI completed its final cost-plus contracts sometime in April 1994, and neither Bellow nor PICI performed any work for Amoco after April 1994.

[11] Jordan worked as a contract specialist with the Contracts group from 1987 to 1990. From October 1990 to September 1991, he was the supervisor of the Contracts group. In September 1991,

incidents of racial discrimination attributed to Jordan include the following: (1) in 1989, Jordan told Phillips that he believed Bellow made too much money as a field superintendent; (2) in 1989, Bellow learned from Phillips, who in turn had been so informed by Albert De Los Santos (De Los Santos), another Amoco contractor, that Jordan had told De Los Santos "Albert, whenever you drive a white Cadillac or a Lincoln [like Bellow's wife], I'll stop doing business with you because you done made too much money"; (3) in 1990, when Bellow complained to Jordan about racist comments made by Sherman McNown (McNown), an Amoco Turnaround Superintendent, Jordan told Bellow that he could not do anything because he (Jordan) was prejudiced against African-Americans;[12] (4) between 1991 and 1994, when Jordan was supervisor of the PS&C group, Emmanuel Moore (Moore), a contracts specialist with the Amoco purchasing department, received complaints from Amoco job representatives that Jordan was treating PICI differently because of Bellow's race; (5) in 1993, Jordan told Melvin Hagler (Hagler), an Amoco job representative, at a job representatives meeting to make sure PICI workers left the refinery as soon as they finished their jobs; (6) in 1993 or 1994, Hagler told Bellow that Jordan did not like him and that "Jerry is going to get you"; (7) in 1994, Hagler told Bellow that he overheard Jordan telling another job representative, Howard Luster (Luster), that he (Jordan) would "run [Bellow's] nigger ass off"; and (8) on March 17, 1994, Jordan canceled a job that had been assigned to PICI earlier that morning.[13]

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he became the supervisor of the PS&C group.

[12] Apparently, McNown and another Amoco employee, Dewey Bailey, called Bellow a "nigger" on one occasion.

On September 7, 1994, Bellow filed this lawsuit, "individually and on behalf of" PICI, in the district court below asserting claims against Amoco and Jordan under 42 U.S.C. §§ 1981 and 1985(3),[14] as well as under Texas law for

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[13] According to Jordan, he canceled the job after he had determined that an Amoco crew would soon complete another job and would be available to take the job assigned to PICI. A few days after Jordan canceled PICI's job, Bellow filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination against Amoco. The EEOC dismissed the complaint after it learned that Bellow was not an employee of Amoco.

[14] Section 1981 provides in relevant part:

"§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) 'Make and enforce contracts' defined

For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual

tortious interference with the right to contract and intentional infliction of emotional distress. On January 11, 1995, an amended complaint was filed adding PICI as a separate plaintiff, so that the plaintiffs became Bellow and PICI,[15] and adding Sherman McNown, Dewey Bailey, and

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relationship." 42 U.S.C. § 1981.

Section 1985(3) provides in relevant part:

"§ 1985. Conspiracy to interfere with civil rights

...

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3).

[15] Although the amended complaint added PICI as a separate party plaintiff, the caption of the case was never changed in the court record to reflect this amendment.

Larry Blow[16] as defendants. Under their section 1981 claims, plaintiffs Bellow and PICI alleged that Amoco modified, changed, or terminated PICI's contracts with Amoco and Bellow's contract with PICI. Bellow never contracted with Amoco personally, and he did not bring a section 1981 claim against Amoco for interference with his contractual rights with Amoco.

Thereafter, and before the case was submitted to the jury, the court dismissed plaintiffs' section 1985(3) claims, their section 1981 claims against the individual defendants, and their state law claims against all defendants. The only claims submitted to the jury were plaintiffs' section 1981 claims against Amoco. The jury found that Amoco did not discriminate against PICI on the basis of its race by interfering with its right to contract with Amoco. The jury did find, however, that Amoco discriminated against Bellow because of his race "in terminating, modifying or changing Martin Bellow's right to contract with Phillips Industrial Constructors, Inc.," and awarded Bellow $50,000 in "subjective damages" and $225,000 in punitive damages.[17] Amoco timely filed its notice of appeal to this Court.[18]

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[16] Larry Blow (Blow) is a supervisor with the building and maintenance department at Amoco. Bellow alleged that Blow, under Jordan's instructions, told Bellow that PICI did not have a contract on a particular job when, in fact, it did have a contract.

[17] Plaintiffs filed a motion for an award of attorneys' fees. The district court stayed consideration of the attorneys' fees application pending final resolution of the case on appeal.

[18] Neither PICI nor Bellow has appealed the judgment in favor of Amoco on PICI's claims against it or the judgment in favor of Amoco on all of Bellow's other claims (his claims other than his

Discussion

I.

On appeal, Amoco contends that the district court erred in denying Amoco's motion for judgment as a matter of law because Bellow never had a contract with PICI and, therefore, Amoco could not have possibly interfered with Bellow's right to contract with PICI; even if Bellow did have a contract with PICI, there is no evidence that Amoco terminated, modified, or changed that contract; and the evidence is insufficient to support the jury's conclusion that Amoco intentionally discriminated against Bellow on the basis of his race. Amoco also argues that the evidence does not sufficiently support the $50,000 in "subjective damages" and $225,000 in punitive damages.

We review de novo the denial of Amoco's motion for judgment as a matter of law, applying the same standards as those applied by the trial court. *Canutillo Independent School Dist. v. Leija,* 101 F.3d 393, 396 (5th Cir. 1996). We review factual issues for the presence of substantial evidence supporting the verdict and legal issues de novo. *Heller Financial, Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 523 (5th Cir. 1996). A motion for judgment as a matter of law should be granted by the trial court if, after considering all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable jurors could not arrive at a contrary verdict.[19] *Boeing Co. v. Shipman*, 411 F.2d 365, 374

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section 1981 claim against Amoco for interfering with his asserted contract, or right to contract, with PICI) against Amoco.

(5th Cir. 1969), overruled on other grounds, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

II.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The phrase "make and enforce contracts" is defined to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[20] 42 U.S.C. § 1981(b).

To prevail under section 1981, the plaintiff must prove a prima facie case of intentional discrimination. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). The plaintiff may establish a prima facie case by direct evidence or, more commonly, by circumstantial evidence of discriminatory motive. *Harrington v. Harris*, 108 F.3d 598,

[19] Amoco timely moved for judgment as a matter of law at the close of the plaintiffs' case-in-chief and at the close of all the evidence.

[20] In *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), the Supreme Court held that post-contract formation allegations of racially discriminatory conduct were not actionable under section 1981, as section 1981 only governs racial discrimination in the "making" of contracts and the right to "enforce" the contract. Id. at 2372-74. Through the Civil Rights Act of 1991, enacted November 21, 1991, Congress expanded section 1981 to include post-contract formation claims.

606 (5th Cir. 1997); *Wallace*, 80 F.3d at 1047-48. To establish a section 1981 claim, the plaintiff must show that (1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute; in this case, the making and enforcing of a contract.[21] See Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir. 1994).

III.

As a threshold matter, we observe that this Court has not yet decided whether a plaintiff has a cause of action under section 1981 against a third party for interference with the plaintiff's right to make and enforce contracts. Indeed, on at least one prior occasion we have suggested that such a claim may not be covered by section 1981. See *Green*, 27 F.3d at 1086-87 (explaining that the plaintiff failed to state a claim under section 1981, as he did not "complain that [defendant] refused to contract with him or that [it] somehow impeded his right to enforce a contract in either the courts or nonjudicial avenues," but merely alleged "that the defendant refused to honor a third-party contract he had with his clients"). Thus, we express some doubt as to whether Bellow has, in the first instance, presented a cognizable claim under section 1981.

Bellow contends that we held in *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975), that third party interference claims are actionable under section 1981. We do not read Faraca so

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[21] Of course, as an African-American, Bellow is a racial minority covered by section 1981.

broadly. In Faraca, the plaintiffs successfully sued the director of the Georgia Retardation Center under section 1981, alleging that the director refused to hire Faraca, a Caucasian, because his wife was African-American. On appeal, we affirmed the judgment, concluding that the director could be held personally liable under section 1981 for interfering with the plaintiffs' right to contract with their prospective employer, the State of Georgia. The director in Faraca was only nominally a third party. In substance, because he was acting on behalf of the state when he decided not to hire Faraca----thus making his hiring decision indistinguishable from that of the state----the director and the state were essentially one and the same. Cf. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir. 1986) (holding that plaintiff could bring section 1981 claim against individual members of tenure committee for denying plaintiff tenure if individuals were personally involved in the discrimination and if they intentionally caused the college to violate plaintiff's right to contract), aff'd on other grounds, 107 S.Ct. 2022 (1987). Conversely, Amoco never had any such relationship with PICI or Bellow. Amoco exercised no control and had no authority over the contracting decisions of PICI or Bellow. Unlike the situation in Faraca, where the third party and prospective contracting party were the same party, Amoco is separate and distinct from PICI, Bellow's contracting party. Since Faraca, this Court has not offered any opinion as to whether all third party interference claims are actionable under section 1981, and we decline to rule on this issue today.[22]

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[22] At least one other circuit has also expressly declined to rule on this issue. See *Jordan v. Campbell-Taggart, Inc.*, 902 F.2d 28 (tab.), No. 87-3595, 1990 WL 51819, at *2-*3 (4th Cir. April 17, 1990).

Instead, we leave for another day the resolution of that issue because even assuming, arguendo, that Bellow's claim falls within the ambit of section 1981, Bellow nevertheless is not entitled to any recovery because he has failed to satisfy the third element of his section 1981 claim----that is, that the discrimination concerned one or more of the activities enumerated in the statute. Specifically, even assuming that the evidence justifies a finding that Bellow had some unspecified character of implied contractual relationship with PICI, there is clearly no evidence that Amoco ever modified, changed, or terminated that relationship or Bellow's right to contract with PICI.

Although we assume, for purposes of this appeal, that Bellow had some undefined character of implied contract with PICI, we note that the record is conspicuously devoid of any evidence of any express contract between Bellow and PICI.[23] At trial, Bellow produced no document and presented no testimony evidencing the terms, provisions, or conditions of any contractual relationship between him and PICI.

Bellow's mere ownership interest in and position as president of PICI does not, in and of itself, suffice to establish a contractual relationship. Although Bellow, by virtue of his position as president of PICI, assumed certain legal obligations to his company under state law, see, e.g., *Gearhart Industries, Inc. v. Smith Intern., Inc.*, 741 F.2d 707, 719-21 (5th Cir. 1984), these obligations arose from his fiduciary relationship with PICI, not from any contractual

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[23] Bellow has never alleged that he personally had or sought to have any contractual relationship with Amoco; he has alleged only that he had a contract with PICI.

relationship. See generally *F.D.I.C. v. Dawson*, 4 F.3d 1303, 1307 (5th Cir. 1993) (distinguishing between breach of fiduciary duty claim and breach of contract claim for statute of limitations purposes), cert. denied, 114 S.Ct. 2673 (1994); accord *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1374 (5th Cir. 1994). Although we do not doubt that a president of a corporation can (and perhaps usually does) have an employment contract with the corporation, in this case, where the president also happens to be the 51% owner of the company, and the company's executive vice president owns the other 49%, and where there is no evidence of any express contract of any kind (written or oral) between the corporation and the president, it may not simply be assumed that such a contract existed. Bellow has cited no authority, nor has our own research revealed any, suggesting that an individual's status as majority shareholder and president of a corporation, without more, gives rise to a contractual relationship between the individual and the corporation.

Bellow argues that he was paid on an hourly basis which, according to him, conclusively proves that he had an employment contract with PICI. The record flatly contradicts Bellow's assertion, as the evidence shows that he was not paid by the hour, but rather was paid a fixed weekly salary. Bellow presented no evidence indicating that he received an hourly wage, nor did he establish what his hourly pay was or whether PICI docked his pay for time missed. Indeed, the evidence shows that Bellow exercised considerable discretion over his salary, as he and Phillips jointly decided how much they were paid and how much of a bonus they would receive in any given year. Although Bellow occasionally received overtime pay for working after hours and on weekends, Bellow presented no evidence at trial

describing how much he was paid per hour for overtime work (or how this was determined).

IV.

Even assuming, arguendo, that Bellow did in fact have a contract with PICI which Amoco could have interfered with, Bellow would still be unable to recover any damages because he has failed to present any evidence that Amoco did in fact interfere with the contract. There is no evidence that Bellow's relationship with PICI, contractual or otherwise, was in any way changed, modified, altered, terminated, or otherwise affected by any of Amoco's actions. Nor is there any evidence that PICI ever failed or refused to honor or comply with any request by Bellow to PICI for it to enter into any contract with Bellow. Instead, what the record does show is that Bellow remained at all times the 51% owner and president of PICI before, during, and after the alleged discriminatory conduct by Amoco.[24] See, e.g., *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1170-71 (5th Cir. 1996) (explaining that "[i]n deciding whether a change of position rises to the level of a new and distinct relation [under section 1981], the court must compare the employee's current duties, salary, and benefits with those incident to the new position"); *Harris v. Associates Corp. of North America*, 917 F.2d 195, 197-98 (5th Cir. 1990) (same); see generally *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (stating that "[a] claim for interference with the right to make and enforce a contract must allege the actual loss of a contract interest").

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[24] Indeed, the amended complaint alleges that Bellow is the "President and Chief Executive Officer" of PICI.

In support of his contention that Amoco interfered with his asserted contract with PICI, Bellow directs this Court's attention to the July 1989 incident where Jordan expressed concerns about Bellow's excessive compensation to Phillips and suggested that Bellow spend less time at the Amoco refinery. As the record shows, although Phillips and Bellow discussed the possibility of having Bellow spend more time in the office, they ultimately decided that Bellow would remain in his capacity as field superintendent on Amoco jobs. That Bellow continued to supervise workers in the field, despite Jordan's recommendation, demonstrates not only that Bellow's relationship with PICI remained unchanged, but also indicates that Amoco could not, even had it wanted to, interfere with Bellow's relationship (or contract, if any) with PICI. Certainly, there is no evidence showing otherwise.

Bellow also points to his decrease in income as evidence of Amoco's asserted contractual interference. While it may true that Bellow's income suffered after Amoco allegedly interfered with his asserted contractual relationship with PICI, this loss of income was not a result of any change in his relationship or status with PICI----as he continued to be PICI's 51% owner, president, and chief executive officer----but rather was caused by the fact that PICI no longer received the same high volume of work from Amoco. Bellow performed less work and received a smaller income not because of any decision by PICI to reduce his hours or to cut his salary, but because PICI received less work from Amoco. As PICI had less work, it necessarily follows that Bellow, PICI's president and majority owner, also would have less work and, hence, less income.[25] Although Bellow

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[25] Moreover, the district court specifically instructed the jury, without objection by Bellow, that Bellow could not recover any damages "for lost income, wages or other earnings" caused by

may not have made as much money as he did when PICI received large volumes of work from Amoco on a consistent basis, there is no evidence that once Amoco's asserted discriminatory endeavor began and PICI's annual revenues plummeted, that PICI reduced Bellow's weekly salary while requiring him to work the same number of hours, that PICI stopped measuring his overtime pay based on extra hours worked, or that PICI in any other way modified or changed his compensation structure. And, as mentioned above, Bellow at all times remained PICI's 51% owner and president.

Stripped of its veneer, Bellow's argument, in essence, is that Amoco interfered with his right to contract with PICI by interfering with PICI's contracts or ability to contract with Amoco. The obvious problem Bellow faces with this argument, of course, is that the jury found that Amoco did not interfere with PICI's contracts, or ability to contract, with Amoco on the basis of race.[26]

Moreover, because Bellow's claim against Amoco is merely derivative of PICI's cause of action, Bellow has no individual section 1981 claim against Amoco. In this regard, we find our decision in *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir.), cert. denied, 111 S.Ct. 438 (1990), dispositive. In Searcy, the president/sole shareholder of an energy resource firm that produced and supplied natural gas sued various utility companies for refusing to enter into long-term natural gas supply contracts with the energy firm. The plaintiff and his company each sued the utility

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Amoco's alleged discrimination.

[26] And, Bellow does not challenge this finding.

companies under section 1981. We held that the plaintiff could not bring his individual section 1981 claim because the discrimination could only be asserted to invade the legal rights of the corporation and not the rights of the plaintiff, the company's sole shareholder. *Id.* at 565.

Similarly, in this case the legal right that Bellow asserts Amoco violated----that is, the right to contract free from racial discrimination----is indistinguishable from PICI's right to contract under section 1981. The Amoco work that Bellow lost which purportedly gave rise to Bellow's section 1981 claim was the exact same Amoco work that PICI lost. Indeed, Bellow has not alleged, nor does the record reflect, any violation of his contract rights or rights to contract that differs from the violations claimed by PICI against Amoco. See, e.g., *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (holding that shareholders in bank could not maintain section 1983 action in respect to treatment of bank as only the bank suffered any cognizable injury); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968) (explaining that a "stockholder's rights are merely derivative and can be asserted only through the corporation" and that this "rule is applicable in cases where the individual is the sole shareholder"). Thus, because Bellow suffered no violation of his contract rights or rights to contract which differs from the violations claimed by PICI, we conclude that Bellow has no individual cause of action under section 1981 against Amoco.[27] See *Flynn v. Merrick*, 881 F.2d 446, 449-50

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[27] Although Bellow claimed that he sustained emotional damages that were different from PICI's economic damages, his emotional damages result from the same violation that gave rise to PICI's economic damages----Amoco's alleged violation of PICI's right to contract. Bellow does not have an individual claim for an alleged violation by Amoco of PICI's section 1981 rights, whether

(7th Cir. 1989) (holding that individual stockholders and debenture holders could not bring suit under 42 U.S.C. § 1983 for damages suffered by the corporation); *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1181-83 (5th Cir. 1985) (holding that partner had no individual cause of action for breach of contract, interference with partnership business, loss of value of partnership interest, loss of income, salary or bonus, and damage to reputation and prospective business advantage suffered by partnership); *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981) (holding that bank's shareholders could not recover for fraud, breach of confidential relationship, and conspiracy against purchasers of bank's assets because diminution in value of bank's stock was insufficient direct harm to shareholders); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (holding that stockholder, who was president and general manager of corporation, could not maintain individual action under section 1983).

Conclusion

We hold that Bellow is not entitled to recover any damages under section 1981. Even if Bellow did have some undefined, implied contractual relationship with PICI, nothing in the record supports the jury's conclusion that Amoco in any way altered, modified, or terminated any of his rights thereunder or to contract with PICI.[28] For these reasons, the judgment

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or not Bellow suffered emotional damage as a result thereof.

[28] Moreover, we question whether Bellow was entitled to an award of "subjective" damages. In particular, we do not believe that Bellow's testimony that Amoco's alleged discriminatory acts caused him to feel "less than a man" and "ruined his reputation as a man," without more, sufficiently supports the award of emotional

below is REVERSED and judgment is here RENDERED for Amoco.

REVERSED and RENDERED

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damages. Nor is there any other evidence supporting such an award. See, e.g., *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938-39 (5th Cir. 1996) (reversing $40,000 award for emotional distress under section 1981 where only evidence of emotional distress was plaintiff's own testimony that he felt "frustrated" and "real bad"; that his work environment was "unbearable" and was "tearing my self-esteem down"; and that he felt "angry" and "paranoid" because his supervisor referred to him as a "porch monkey" or "nigger"), cert. denied, 117 S.Ct. 767 (1997). Bellow did not testify about any physical harm or injuries, nor did he testify about any stress, emotional pain, or other similar conditions.

However, we need not reach the merits of this issue. Nor do we need to address Amoco's contention that the evidence fails to support the jury's finding of intentional racial discrimination and award of $225,000 in punitive damages.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARTIN BELLOW, INDIVIDUALLY AND ON BEHALF OF PHILLIPS INDUSTRIAL CONSTRUCTORS, INC.

V.

CIVIL ACTION NO. C-94-540

AMOCO OIL COMPANY, TEXAS CITY REFINERY

VERDICT

1. Do you find from a preponderance of the evidence that Amoco Oil Company discriminated against Phillips Industrial Constructors, Inc. because of its race in terminating, modifying changing, or refusing to contract with it?

Answer Yes or No: no

2. Do you find from a preponderance of the evidence that Amoco Oil Company discriminated against Martin Bellow because of his race interminating, modifying or changing Martin Bellow's right to contract with Phillips Industrial Constructors, Inc.?

Answer Yes or No: yes

If you answered "yes" to Question No. 1, then answer Question No. 3.

3. What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff Phillips Industrial Constructors, Inc. for economic damages incurred because of Amoco Oil Company's conduct?

ANSWER (in dollars and cents):$_____

If you answered "yes" to Question No. 2, then answer Question No. 4.

4. What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff Martin Bellow for subjective damages incurred because of Amoco Oil Company's conduct?

ANSWER (in dollars and cents): $50,000.00

If you answered "yes" to Question No. 1 and awarded damages in Question No. 3, then answer Question No. 5.

5. Do you find from a preponderance of the evidence that Defendant Amoco's discriminatory conduct found by you in Question 1 was malicious, egregious, willful, and in reckless or gross disregard of the rights of Phillips Industrial Constructors, Inc.?

Answer Yes or No: .....

If you answered "yes" to Question No. 5, then answer Question No. 5A.

5A. What amount of money, if any, if paid now in cash, do you find should be assessed against Amoco Oil Company as punitive damages for the conduct you found in response to Question No. 1 concerning PhillipsIndustrial Constructors, Inc.

ANSWER (in dollars and cents):$_____

If you answered "yes" to Question No. 2 and awarded damages in Question No. 4, then answer Question No. 6.

6. Do you find from a preponderance of the evidence that Defendant Amoco Oil Company's discriminatory conduct found by you in Question No. 2 was malicious, egregious, willful, and in reckless or gross disregard of Martin Bellow's rights?

Answer Yes or No: yes

If you answered "yes" to Question No. 6, then answer Question No. 6A.

6A. What amount of money, if any, if paid now in cash, do you find should be assessed against Amoco Oil Company as punitive damages for the conduct you found in response to Question No. 2 concerning Martin Bellow?

ANSWER (in dollars and cents) :$ 225, 000. 00

September 25, 1995 s/Stephen W. Branch

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARTIN BELLOW, INDIVIDUALLY AND ON BEHALF OF PHILLIPS INDUSTRIAL CONSTRUCTORS, INC.

V.

CIVIL ACTION NO. C-94-540

AMOCO OIL COMPANY, TEXAS CITY REFINERY

FINAL JUDGMENT ON JURY VERDICT

This action came for trial before a jury, on September 18, 1995, Honorable Samuel B. Kent presiding, and the jury having reached its verdict, and the Court finding the verdict to be fair and reasonable in the circumstances, it is accordingly

ORDERED, ADJUDGED and DECREED that Defendant Amoco Oil Company did not discriminate against Plaintiff Phillips Industrial constructors, Inc. (PICI) in violation of 42 U.S.C. § 1981, and that PICI takes nothing from Amoco on the Jury Verdict.

ORDERED, ADJUDGED and DECREED that Plaintiff Martin Bellow do have and recover from Defendant Amoco Oil Company, Texas City Refinery, the sum of

$275,000.00, together with interest as may be appropriate under law.

For the reasons set forth in the Order issued by the Court this day, consideration of the Plaintiffs' application for an award of attorney's fees and costs is hereby STAYED pending appellate review of the Jury Verdict in this case. As is further set forth in a separate Order issued by the Court this day, the Defendant's Motion for Judgment as a Matter of Law is hereby DENIED.

This is a FINAL JUDGMENT.

IT IS SO ORDERED.

DONE this 20th day of December, 1995, at Galveston, Texas.

/s/_____
Samuel B. Kent
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MARTIN BELLOW, INDIVIDUALLY
AND ON BEHALF OF PHILLIPS
INDUSTRIAL CONSTRUCTORS, INC.

V.

CIVIL ACTION NO. C-94-540

AMOCO OIL COMPANY, TEXAS CITY
REFINERY

ORDER

Presently before the Court is the Defendant's Motion for Judgment as a Matter of Law. For the reasons set forth below, the Motion is hereby DENIED.

Plaintiff Phillips Industrial Constructors, Inc. (PICI) is classified as a minority contractor under 42 U.S.C. § 11246. Plaintiff Martin Bellow, who is black, is the president of PICI and owns 51% of PICI's stock. Harold Phillips, who is white, owns the remaining 49% of the stock. The Plaintiffs alleged Amoco interfered with their right to make and enforce contracts because of their race, in violation of 42 U.S.C. § 1981. While the jury found that Amoco did not discriminate against PICI or interfere with PICI's right to contract, the jury did conclude Amoco discriminated against Bellow individually and interfered with his right to contract. The jury awarded Bellow $50,000 in actual damages and $225,000 in punitive damages. Pursuant to Fed. R. Civ. P. 50, Amoco now seeks to set aside the jury

verdict, contending it is entitled to judgment against Bellow's claims as a matter of law.

I.

A motion for judgment as a matter of law challenges the sufficiency of the evidence supporting the jury's verdict. See Fed. R. Civ. P. 50. When deciding a motion for judgment as a matter of law, the proper inquiry is whether the record contains evidence from which a reasonable trier fact could have reached the conclusion reached by the jury. Leatherwood v. Houston Post Co., 59 F.3d 533 (5th Cir. 1995). If, after considering all the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in his favor, "' the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict,' the court should enter judgment as a matter of law." Id. at 535 (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)). With this exacting standard in mind, the Court will consider Amoco's Motion.

II.

Amoco first contends that, as a matter of law, Bellow has no § 1981 claim against it, because there was no privity of contract between Bellow and Amoco. In essence, Amoco argues that because it did not enter into a contract with Bellow, it could not have interfered with Bellow's right to make and enforce contracts. The Court rejects this argument.

As to Bellow's § 1981 claim, the Plaintiff's position was that Amoco interfered with Bellow's right to contract with PICI, not with Amoco. As president, Bellow clearly had contractual relationship with PICI, and sufficient evidence of that contractual relationship was presented to the jury. By discriminating against Bellow because of his race, Amoco interfered with Bellow's contractual relationship with PICI, as evidenced by the testimony that Bellow and Phillips considered changing Bellow's responsibilities to reduce his visibility and the friction with Amoco. "An important purpose of section 1981 is to eliminate race based interference with the right of each citizen to contract. In accordance with this principle, courts have not imposed a privity of contract type requirement that would otherwise protect third parties from section 1981 liability." Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1313 (9th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993). Thus, the fact that Bellow and Amoco were not in contractual privity with each other does not exempt Amoco from liability for the discrimination clearly found by the jury.

Amoco also contends Bellow is not the real part in interest in this litigation, and that Bellow has no claim idependent of PICI's claim against Amoco. While the Court agrees that shareholders generally cannot maintain an action to redress an injury to the corporation, e.g., Gregory v. Mitchell, 634 F.2d 199 (5th Cir. 1981), the injury for which Bellow sought redress is not the corporation's injury, but his own. As discussed above, Bellow contended and the jury found that Amoco interfered with Bellow's right to contract with PICI. This injury is separate from any that may have been suffered by PICI, and is actionable by Bellow individually. Accordingly, the Court hereby rejects

Amoco's arguments that Bellow's claim is not cognizable under § 1981.

III.

Alternatively, Amoco contends that even if Bellow's claim is cognizable under § 1981, he failed to establish a *prima facie* case of unlawful discrimination. In particular, Amoco argues that Bellow presented "no evidence that the relationships of non-minority presidents to their respective companies were not affected in the same manner as was Plaintiff's Bellow's." According to the Amoco, all the contractors with which PICI competed experienced a proportionate decrease in the amount of general maitenance work they received from Amoco. Additionally, Amoco contends the "uncontroverted evidence" presented through Emmanuel Moore established that non-minority contractors were treated the same as PICI in connection with "field-directed" work. The Court disagrees with this characterization of the evidence.

The Plaintiffs presented sufficient evidence from which the jury could reasonably conclude that Amoco intended to force Bellow out of the refinery. There was evidence from two Amco employees, Melvin Hagler and David Leining, that Amoco and Jerry Jordan, then superintendent of Plant Support and Contractors, wanted Bellow's "nigger ass" out of the facility. The Plaintiffs also presented evidence from which the jury could conclude that Jordan refused to award contracts to PICI even though PICI had been requested by the contracts administrator. In addition, Emmanuel Moore, another Amoco employee, testified that Bellow and PICI were treated differently from other contractors. While Moore refused to specifically

testify that Bellow and PICI were singled out because of Bellow's race, after repeated questioning by the Plaintiffs' attorney, he did state that PICI was the only contractor treated differently by Amoco, and that PICI was the only minority contractor. From this testimony, particularly when coupled with Moore's obviously reluctant and hesitant demeanor while testifying, the jury could reasonably infer that Bellow and PICI were singled out because of Bellow's race. Accordingly, the Court concludes that there was sufficient evidence from which th jury could reasonably conclude that Bellow established a *prima facie* case of unlawful discrimination. Likewise, the evidence discussed above was sufficient for the jury to reasonably conclude that Bellow proved Amoco's proffered explanation for its treatment of Bellow and PICI was merely a pretext for discrimination.

The Court also rejects Amoco's argument that the Plaintiff did not present evidence of discriminatory conduct occurring within the limitations period. The Complaint in this case was filed on September 7, 1994; thus, applying the Texas statute of limitations, Amoco contends the Plaintiffs did not present evidence of any discriminatory conduct occurring after September 7, 1992.

The Plaintiff presented evidence that during a job representatives meeting in 1993, Amoco supervisors stated that they wanted to run Bellow and PICI out of the refinery. In addition, the Plaintiffs presented evidence that in 1994 Jordan told another Amoco employee that he was going to run Bellow out of the facility. This evidence is sufficient for the jury to conclude that Amoco committed discriminatory acts within the limitations period. The jury was properly charged that while conduct occurring before September 7,

1992, could be considered as evidence of discriminatory intent, the Plaintiffs could recover only for discriminatory conduct occurring after that date. The Court is confident the jury followed these instructions, and awarded damages only for the actions occurring after September 7, 1992. See, e.g., Smith v. Hearod, 498 F.2d 663 (5th Cir. 1974) (the jury is presumed to follow its instructions).

IV.

Amoco also contends there is insufficient evidentiary support for the damages the jury awarded to Bellow. First, Amoco contends there is no evidence to support the jury's award of $50,000 compensatory damages to Bellow. The jury was instructed that Bellow could recover damages only for his mental or emotional distress. Bellow testified about the effect Amoco's conduct had on him, and testified that the discrimination "affected his manhood." Considering the nature of the case and Bellow's testimony, the Court concludes there was sufficient evidence from which the jury could reasonably value the damages suffered by Bellow at $50,000.

Finally, Amoco contends the punitive damage award must fall. According to Amoco, there was no evidence before the jury that any discriminatory conduct was authorized or approved by a managing agent of Amoco. The Court disagrees. The jury was presented with ample evidence that Jerry Jordan discriminated against Bellow and PICI. As Plant Support and Contracting Superintendent, Jordan had the authority to make decisions that determine corporate policy; therefore, actions by Jordan could support an award of punitive damages against Amoco. In addition, the jury was presented with testimony of Melvin Hagler, who

testified that Doug Blythe, Jordan's superior, also stated that he wanted Bellow and PICI out of the refinery. Thus, the jury was presented with evidence from which it could reasonably conclude that the discrimination practiced against Bellow was authorized or approved by a managing agent of Amoco. Moreover, evidence that Amoco wanted Bellow's "nigger ass" out of the facility is more than sufficient to show that Amoco's actions were willful, egregious, malicious, and in reckless or gross disregard of Bellow's rights. The Court therefore concludes that the jury's award of punitive damages is reasonable and is supported by the evidence presented at trial.

Therefore, after considering Amoco's Motion, the Court concludes that the evidence is not so strongly or overwhelmingly in favor of Amoco that reasonable men could not have reached the verdict reached by the jury. Accordingly, Amoco's Motion for Judgment as a Matter of law is hereby DENIED.

IT IS SO ORDERED.

DONE this 20th day of December, 1995, at Galveston, Texas.

/s/_____
Samuel B. Kent
U.S. District Judge

(2)

Supreme Court, U.S.
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No. 97-0670

In The

Supreme Court of the United States

October Term, 1997

MARTIN J. BELLOWS, Individually and on Behalf of Phillips Industrial Constructors, Inc.,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

RULE 29.6 STATEMENT

The parent company of Amoco Oil Company is Amoco Company. The parent company of Amoco Company is Amoco Corporation. The nonwholly-owned subsidiaries of Amoco Oil Company are as follows:

Amoco Mexico Holding Company S.A. de C.V.
Amoco Chemical de Mexico, S.A. de C.V.
Amoco Fabrics & Fibers de Mexico, S.A. de C.V.
Amoco Fabrics & Fibers Servicios S.A. de C.V.
Amoco Fabrics & Fibers Servicios Administrativos, S.A. de C.V.
Amoco Oil De Mexico, S.A. de C.V.
Amoco Servicios Mexicanos, S.A. de C.V.
Empresas Amoxxo, S.A. de C.V.
Inmobilaria Sitios Verdes
Amoco Sulfur Recovery Company
Huaneng Amoco Clean Energy Company
Renaissance Center Partnership

LIST OF INTERESTED PARTIES

Jerry Jordan, Sherman McNown, Dewey Bailey and Larry Blow, defendants below, are no longer parties to this action. Texas City Refinery was never a defendant below and has no interest in this action.

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STATEMENT OF THE CASE

I. Nature Of The Case

Phillips Industrial Constructors, Inc. ("PICI") was a general maintenance contractor at Amoco Oil Company's ("Amoco") Texas City Refinery ("Refinery"). Martin Bellow was, at all times, the 51% owner and president of PICI.

This civil rights action arose out of Amoco's decision to reduce the number of general maintenance contractors working in the Refinery. As part of this process, Amoco decided to use a single, primary contractor to perform most of the general maintenance work that Amoco's own personnel could not perform. As a result of Amoco's use of a primary general maintenance contractor, by 1990 PICI and all other general maintenance contractors experienced a dramatic decline in the volume of their general maintenance work. PICI's annual gross revenues from Amoco work dropped from approximately $3.5 million in 1990 to $209,537 in 1994.

II. Course Of Proceedings And Disposition

Bellow filed his lawsuit "individually and on behalf of" PICI on September 7, 1994. Originally, Bellow asserted claims against Amoco and one of its employees, Jerry Jordan, under 42 U.S.C. §§ 1981 and 1985(3), as well as under Texas law for tortious interference with the right to contract and the intentional infliction of emotional distress. On January 11, 1995, Bellow and PICI filed an amended complaint adding PICI as a separate plaintiff and adding other Amoco employees as defendants.

The district court held trial before a jury on September 18 through 25, 1995. Before submitting the case to the jury, and with no opposition from plaintiffs, the district court dismissed

plaintiffs' § 1981 claims against the individual defendants, and their § 1985(3) claims and state law claims against all defendants.[1] The district court only submitted to the jury plaintiffs' § 1981 claims against Amoco. The jury answered "No" to the question,

> Do you find from a preponderance of the evidence that Amoco Oil Company discriminated against Phillips Industrial Constructors, Inc. because of its race in terminating, modifying, or refusing to contract with it?

Record on Appeal, p. 705 (R. 705). The jury did find that Amoco discriminated against Bellow in changing, modifying or terminating his right to contract with PICI. The jury awarded Bellow $50,000 for "subjective damages" and $225,000 in punitive damages.

The questions presented before the United States Court of Appeals for the Fifth Circuit, were: (i) whether Bellow had a contract with PICI; (ii) even if a contract existed, whether the evidence established that Amoco terminated, modified or changed that contract; and (iii) whether evidence supported the jury's conclusion that Amoco intentionally discriminated against Bellow on the basis of his race. Amoco also presented the question of whether the evidence supported the jury's award of $50,000 in "subjective damages" and $225,000 in punitive damages.

The Fifth Circuit unanimously reversed the district trial court's judgment in favor of Bellow and entered judgment in

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1. Among the claims dismissed was Bellow's tortious interference with the right to contract claim, which involved essentially the same theory as Bellow's individual § 1981 claim, *i.e.*, that Amoco interfered with, terminated, modified or changed his alleged contract with PICI.

favor of Amoco.[2] The Fifth Circuit reviewed the record in detail and concluded that the evidence did not support the jury's verdict in favor of Bellow.

The Fifth Circuit began its decision by making two assumptions in Bellow's favor. First, although declining to rule on the issue of whether all third-party claims are actionable under § 1981, the Fifth Circuit assumed that Bellow had an actionable § 1981 claim against Amoco. Second, although finding the record devoid of any evidence of a contract between Bellow and PICI, the Fifth Circuit assumed that Bellow had some type of implied contract with PICI. Despite these assumptions, the Fifth Circuit concluded that there was no evidence that any Amoco action changed, modified, altered, terminated, or otherwise affected Bellow's relationship with PICI. The Fifth Circuit also concluded that no Amoco action toward PICI or Bellow was motivated by race, as reflected in the jury's verdict in favor of Amoco on PICI's § 1981 claim. (R. 705).

Bellow did not seek rehearing *en banc* by the Fifth Circuit.

III. Statement Of Facts

Bellow, an African-American, and Harold Phillips, a Caucasian, worked throughout the 1970s in the construction industry, primarily in Texas City, Texas and the surrounding Gulf Coast area. During the 1970s, the two men worked together for various construction firms and thereby became acquainted with each other.

In 1978, Phillips formed his own construction company, PICI. In 1979, in order to obtain maintenance and construction

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2. Bellow did not cross-appeal the judgment in favor of Amoco on PICI's § 1981 claim.

work from Amoco as a minority-owned company, Phillips offered Bellow a 51% ownership interest in PICI. Bellow accepted the offer and also became president of PICI while Phillips became PICI's vice-president owning 49% of the company.

After the creation of the partnership, and throughout the 1980s, PICI's business relationship with Amoco flourished. Over those years, Amoco contracted with PICI for maintenance services and paid it several millions of dollars for those services. During this time, PICI derived almost all of its work and revenue from Amoco.

After reevaluating its use of contractors at the Refinery, Amoco decided by 1989 or 1990 to use a single, primary contractor to perform most of the general maintenance work that Amoco's own personnel could not perform. Under Amoco's new policy, general maintenance work was first assigned to its own personnel. If Amoco personnel were unavailable, Amoco assigned the work to Brown & Root Industrial Services ("BRIS"). Only if BRIS could not perform the work did Amoco contract the job to another maintenance contractor such as PICI. Bellow conceded at trial that racial animus did not motivate Amoco's decision to use a single, primary general maintenance contractor.

As a result of Amoco's new contractor policy, PICI and all other general maintenance contractors, including "white-owned" contractors, experienced a dramatic decline in their general maintenance work. Bellow misrepresents this fact in his Petition. He states that a contractor, Trey Industries, received more work from Amoco at this time. The undisputed record evidence established that the contractors that continued to work in the Refinery were those that changed their business by developing an area of expertise outside of general maintenance work. The

overall level of business for those contractors may have actually increased, but their amount of general maintenance work did decrease. PICI never attempted to increase its level of services beyond general maintenance work.

REASONS FOR DENYING THE WRIT

I.

THE PETITION HAS NOT IDENTIFIED AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE ADDRESSED BY THIS COURT.

In reaching its decision below, the Fifth Circuit neither decided an important question of federal law that should be addressed by this Court nor decided an important question of federal law that conflicts with the decisions of this Court. Thus, Supreme Court review is unnecessary.

Bellow argues that Supreme Court guidance is necessary on the issue of whether an individual has a cause of action under § 1981 against a third party for interference with that individual's right to make and enforce contracts. Bellow asks this Court to broadly interpret the Fifth Circuit's decision in *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) and hold that all third-party interference claims are actionable under § 1981.

Although the Fifth Circuit did partially discuss the issue of third-party interference and "express[ed] some doubt as to whether Bellow has . . . presented a cognizable claim," Petition, p. 13a, it declined to resolve the issue and assumed that Bellow could state a cognizable § 1981 claim. It dismissed Bellow's claim because he failed to prove that racial motivation affected any of the contractual rights enumerated by § 1981. Thus, Bellow is merely challenging Fifth Circuit dictum that did not adversely

affect him. Furthermore, on this issue, the Fifth Circuit's opinion does not present a complete, thoughtful decision ripe for this Court's review. Because the issue of third-party liability under § 1981 has not been fully addressed by the other circuits, it deserves further consideration by the appellate courts.[3]

II.

NO CONFLICT BETWEEN CIRCUITS EXISTS.

Bellow fails to identify any United States Court of Appeals decision that conflicts with the Fifth Circuit's opinion. To the best of Respondent's knowledge, there is no case in conflict with the decision of the Fifth Circuit.

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3. The few court decisions addressing the issue have been unique, fact-specific decisions. In these decisions, the courts reviewed a unique factual record and determined that the alleged third parties either were significantly related to the employer or intentionally acted to infringe the plaintiffs' § 1981 rights. For these reasons, the decisions are factually distinguishable from the case at bar. *See Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3rd Cir. 1986) (individuals may be liable under § 1981 where they "authorized, directed, or participated in the alleged discriminatory conduct"); *Daniels v. Pipefitter's Assn Local Union No. 597*, 945 F.2d 906, 915 (7th Cir. 1991) (labor union was not an unrelated third-party but a "necessary intermediary and conduit connecting job opportunities to job referrals"); *Morrison v. Board of Psychiatry*, 908 F. Supp. 582 (N.D. Ill. 1996) (psychiatric board's denial of certification interferes with plaintiff's ability to be employed by individual patients and by medial facilities); *Nieto v. United Auto Workers Local 598*, 672 F. Supp. 987 (E.D. Mich. 1987) (supervisor may state a cause of action against subordinate employees and their union). Furthermore, none of the cases Bellow presents involves a jury verdict finding that the third party did not discriminate against the corporate entity which brought the same § 1981 claim as, and derived its racial identify from, its majority owner.

III.

THE QUESTIONS PRESENTED REQUIRE A REVIEW OF THE APPELLATE COURT'S FACT-SPECIFIC DECISION BASED ON A SUFFICIENCY OF EVIDENCE STANDARD OF REVIEW.

Contrary to Bellow's assertions, the Fifth Circuit has both properly stated the applicable rules of law and properly applied those rules to the record evidence. This case did not turn on any legal issue. Instead, it was based on a sufficiency of the evidence standard after the Fifth Circuit assumed various factual and legal issues in Bellow's favor. Sufficiency of evidence cases are not reviewed by this Court.

IV.

THE QUESTIONS PRESENTED TO THIS COURT FOR REVIEW MISREPRESENT THE APPELLATE COURT'S DECISION.

Bellow argues that Supreme Court review is necessary "to correct the appellate court's indication that Bellow does not have an employment contract." Petition, p. 10. Bellow is mistaken. The Fifth Circuit expressly stated that, whether or not Bellow had an employment contract with PICI, Bellow still could not prevail because the evidence failed to establish that Amoco interfered with that contract. Petition, p. 17a. Moreover, as Bellow himself acknowledges, the Fifth Circuit assumed, in his favor, that some contract between Bellow and PICI did exist. Petition, pp. 3-4, 13. Thus, even if the Supreme Court did determine that Bellow had a contract with PICI, such a determination would not affect the Fifth Circuit's ultimate ruling that Amoco did not terminate, modify or change Bellow's contractual rights because of his race.

Similarly, Bellow is mistaken in his argument that the Supreme Court must review the Fifth Circuit's decision to decline ruling on whether a third party can interfere with a contract and thereby violate § 1981. Again, the Fifth Circuit assumed, in Bellow's favor, that his claim fell within the ambit of § 1981, but rejected Bellow's claim based on the insufficiency of the evidence. Specifically, the Fifth Circuit held that Bellow failed to satisfy his § 1981 burden of proving that Amoco's actions impacted his contractual rights protected by § 1981 and were motivated by his race. It makes no sense for the Supreme Court to review an issue assumed in Bellow's favor and upon which the Fifth Circuit's decision did not turn.

V.

THE PETITION ERRONEOUSLY DOWNPLAYS THE SIGNIFICANCE OF THE JURY'S FINDING THAT AMOCO DID NOT DISCRIMINATE AGAINST PICI.

Bellow points to his decrease in income as evidence of his loss of "the enjoyment of all benefits" of his contract with PICI and, therefore, of Amoco's alleged contractual interference. As the Fifth Circuit recognized, this argument "in essence, is that Amoco interfered with his right to contract with PICI by interfering with PICI's contracts or ability to contract with PICI." Petition, p. 19a. What Bellow fails to recognize and accept is that the jury found that Amoco did not interfere with PICI's contracts, or its ability to contract with Amoco, on the basis of race. That jury finding, which Bellow and PICI never challenged, renders Bellow's argument meaningless. Losing income because your company lawfully has lost business is not something which warrants Supreme Court review.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for writ of certiorari in this matter.

Respectfully submitted,

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